

THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

SECTION 223 PENALTY REDUCTION PROGRAM FOR SMALL ENTITIES

REPORT

TO CONGRESS

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Table of Contents

	Page Number
Executive Summary	4
1.0 Background	6
1.1 Statutory Requirements of Section 223	6
2.0 Scope of EPA's Program	6
2.1 Description of Program	6
2.1.1 Policy on Compliance Incentives for Small Businesses	7
2.1.2 Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations	9
2.1.3 Policy on Flexible State Enforcement Responses to Small Community Violations	10
2.1.4 State Implementation of Penalty Reduction Program	11
2.2 EPA's Program in the Context of its Compliance Assurance Activities.	11
2.2.1 On-site Compliance Assistance	12
2.2.2 Guidance on Conducting Compliance Assessments	12
2.3 Promoting the Penalty Reduction Program	13
2.3.1 Promoting the Small Business Policy.	13
2.3.2 Promoting the Audit Policy	16
2.3.3 Promoting the Small Communities Policy	17

3.0 Results of Program	17
3.1 Small Entity Use of EPA’s Program as Reported by EPA Regions.	17
3.1.1 Summary	17
3.1.2 Data Summary	18
3.2 Small Entity Use of State Penalty Reduction Programs	18
4.0 Conclusion	19

Executive Summary

EPA is pleased to submit this Report to Congress in compliance with §223 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). §223 requires that EPA design and implement a policy or program to support the rights of small entities in enforcement actions, specifically by providing for the reduction, and, under appropriate circumstances, the waiver of civil penalties for certain violations by small entities. EPA has historically addressed the special circumstances of many small entities when assessing penalties in enforcement actions. For example, penalty policies long in place for air, water, and land protection programs provide for reduction in penalties based on “ability to pay.” The *Enforcement Response Policy for Clean Air Act §507 Small Business Assistance Programs*, issued August 12, 1994, also applies to small businesses in potential enforcement situations. Many EPA activities providing enforcement flexibility for small entities pre-date SBREFA, and they provide the platform on which the Agency has mounted its program in response to the §223 mandate.

EPA’s program to reduce or waive penalties for small entities consists of the following three policies:

- EPA’s *Final Policy on Compliance Incentives for Small Businesses (Small Business Policy)* issued May 20, 1996, applies to companies with 100 or fewer employees and provides penalty waivers as incentives to participate in on-site compliance assistance programs or to conduct environmental audits to discover, disclose, and correct violations. Under this policy, small entities are able to discover violations and achieve compliance with minimal risk of penalty. This policy explicitly recognizes State policies that, consistent with Small Business Policy terms, also provide penalty mitigation or waiver for small entities.
- Companies with more than 100 employees, but which are nevertheless considered “small entities” under the Small Business Administration (SBA) definition of “small business,” (See 61 Fed. Reg. 3280 (1996)), can use the Agency’s policy on *Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations (Audit Policy)*. The *Audit Policy*, issued December 1995, reduces penalties for entities of all sizes who find violations through an environmental audit or systematic procedure reflecting the entity’s due diligence, promptly disclose the violations in writing, and correct those violations.
- To address the needs of small communities, in November, 1995, EPA issued its *Policy on Flexible State Enforcement Responses to Small Community Violations (Small Communities Policy)*, which provides small communities not only the tools and flexibility they need to achieve environmental compliance on a diligent but sensible schedule, but also penalty relief.

EPA has started to promote more aggressively the understanding and use of its penalty reduction program both internally and externally.

As of the end of fiscal year 1997 small entities had just begun to make use of EPA's penalty reduction program. EPA Regions report that of 149 small entities applying for penalty relief, 95 qualified for the program and were granted relief; 10 were ineligible; and 44 cases are still under review. These figures may understate the number of small entities currently applying for and receiving penalty mitigation. States are responsible for the vast majority of environmental programs. Due to delegation of enforcement programs to States, small entities have been going directly to their State regulators to seek relief. EPA expects applications to grow over time as both administrators and potential beneficiaries become more familiar with the program. Since this is a new program, EPA Regions are still determining how to effectively implement it in their Regions. Similarly, the regulated community may not yet be adequately familiar with it to recognize its benefits.

Under EPA's program the Government has so far mitigated (i.e., reduced or waived) penalties assessed against small entities by over \$896,470. This number substantially underestimates the full amount of the reduction, however. In some cases, a small entity has qualified for the policy but the amount of penalty mitigation is still under review. In other cases, it is not possible to calculate the exact dollar amount of penalties reduced under EPA's policies.

EPA anticipates that States will play a major role in the implementation of incentive policies. A number of States, in fact, have implemented incentive policies or programs to reduce penalties for small entities. So far 565 small entities have been found eligible for penalty waiver or reduction under State policies. States did not generally provide information on the dollar amount of penalties mitigated under this program.

To increase the benefits of the program EPA must continue aggressively to inform the regulated community, States, and other assistance providers about the availability of penalty reductions to small entities. Realistically, however, many small entities aware of the program may choose not to call attention to themselves by coming forward to seek penalty reduction despite EPA's best efforts to encourage them to participate.

1.0 Background

1.1 Statutory Requirements of Section 223

Section 223 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires agencies to establish a policy or program to reduce or waive civil penalties for violations of statutory or regulatory requirements by small entities. The agency may consider ability to pay in determining penalty assessments on small entities. Subject to statutory and other requirements, the penalty reduction program shall include conditions which may include, but not be limited to:

- (1) requiring the small entity to correct the violation within a reasonable correction period;
- (2) limiting the applicability to violations discovered by participation in a compliance assistance or audit program operated or supported by the agency or state;
- (3) excluding small entities that have been subject to multiple enforcement actions by the agency;
- (4) excluding violations that involve willful or criminal conduct or pose serious health, safety or environmental threats;
- (5) requiring a good faith effort to comply with the law.

The agency must report to Congress no later than two years after enactment of SBREFA on 1) the scope of its program or policy; 2) the number of enforcement actions against small entities that qualified/failed to qualify for the program; and 3) the total amount of penalty reductions and waivers.

2.0 Scope of EPA's Program

2.1 Description of the Program

EPA has historically addressed the special circumstances of many small entities when assessing penalties in enforcement actions. Its activities, in fact, pre-date SBREFA and have been woven into the Agency's current program to consider the needs of small entities in enforcement actions mandated under SBREFA §223. EPA's media penalty policies routinely take into account an entity's "ability to pay" in determining a settlement penalty amount. In August 1994, EPA issued the *Enforcement Response Policy for Clean Air Act Section 507 Small Business Assistance Programs (Section 507 Enforcement Response Policy)* which provides a limited grace period during which a small business may correct violations revealed during assistance visits from a State Small Business Assistance Program (SBAP) established under the Clean Air Act Amendments without penalties being assessed.

EPA expanded the applicability and scope of this policy in issuing its *Final Policy on Compliance Incentives for Small Businesses* on May 20, 1996. This policy applies to companies with 100 or fewer employees and provides penalty waivers as incentives to participate in on-site compliance assistance programs and to conduct environmental audits to discover, disclose and correct violations. Under this policy, small entities are able to discover violations and achieve compliance with minimal risk of penalty. This policy explicitly recognizes consistent state policies that provide penalty mitigation or waiver for small entities.

Companies with more than 100 employees, but which are still considered “small entities” under the Small Business Administration (SBA) definition of “small business” (See 61 Fed. Reg. 3280 (1996)), can use the Agency’s *Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations* policy (*Audit Policy*). The *Audit Policy*, issued December 1995, provides penalty reduction for entities of all sizes who find violations through an environmental audit or systematic procedure reflecting the entity’s due diligence, promptly disclose the violations in writing and correct those violations.

To address the needs of small communities, in November 1995, EPA issued its *Policy on Flexible State Enforcement Responses to Small Community Violations* (*Small Communities Policy*), which provides small communities both the tools and flexibility they need to achieve environmental compliance on a diligent but sensible schedule and provides penalty relief.

2.1.1 Policy on Compliance Incentives for Small Businesses

Purpose. The *Policy on Compliance Incentives for Small Businesses* was issued on May 20, 1996 and became effective June 10, 1996. EPA’s policy applies to all media programs, including water, air, toxics and hazardous waste. The purpose of the policy is to promote environmental compliance among small businesses by providing them incentives to participate in on-site compliance assistance and conduct environmental audits. Further, it encourages small businesses to expeditiously remedy all violations discovered through compliance assistance and environmental audits by providing a settlement penalty policy that reduces or waives penalties for these behaviors and by providing guidance for states and local governments to offer these incentives.

EPA anticipates that States, who are partners in enforcement and compliance assurance and delegated the authority for these activities, will be the primary implementers of EPA’s or a consistent State policy.

In a statement made on the Senate floor during Congressional consideration of SBREFA, Senator Christopher Bond used EPA’s *Small Business Policy* as an example of the kind of policy sought by the §223 requirement. Senator Bond stated, “For example, the Environmental Protection Agency has adopted a small business enforcement policy that satisfies that section.” Vol. 142 No. 46, 142 Cong Rec S 3242 (Friday, March 29, 1996).

Applicability. The policy applies to small entities defined as a “person, corporation, partnership or other entity who employs 100 or fewer individuals” company-wide. EPA’s definition is based on a simplified definition of small businesses that are eligible for assistance by SBAPs established under §507 of the Clean Air Act.

Criteria for Penalty Mitigation. EPA will waive a civil penalty if a small entity satisfies all of the following criteria:

- 1) The small entity has made a good faith effort to comply with applicable environmental requirements as demonstrated by either:
 - C receiving on-site compliance assistance from a government or government-supported program during which the violations are detected; or
 - C conducting an audit and promptly disclosing in writing within ten days the violations discovered during the audit to the appropriate regulatory agency.
- 2) In the past three years, the small business was not subject to an enforcement action for the current violation, and the small business has not been subject to two or more enforcement actions for environmental violations in the past five years.
- 3) The business must correct the violation and remedy any harm associated with it within six months of its discovery. Small businesses which use pollution prevention technologies to fix the violation receive an additional six months to comply.
- 4) There is lack of harm and lack of criminal conduct including:
 - C the violation has not caused actual serious harm to public health, safety or the environment;
 - C the violation is not one which may present an imminent and substantial endangerment to public health or the environment;
 - C the violation does not present a significant health safety or environmental threat; and
 - C the violation does not involve criminal conduct.

If a small business meets all of the criteria, except for the need of a longer corrections period, EPA will waive up to 100% of the gravity component of the penalty. (The gravity component of the penalty includes everything except the economic benefit amount and considers factors such as the harm posed by, seriousness, and duration of the violation.) In the rare instance where the small business has obtained a significant economic benefit from the violation, such that it puts its competitors at a serious marketplace disadvantage, the Agency may seek the full amount of any economic benefit associated with the violation. EPA anticipates that if all the criteria are met, including the corrections period, penalties based on the economic benefit of noncompliance will be collected infrequently.

2.1.2 Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations

This policy, known as EPA's *Audit Policy*, issued December 22, 1995 and effective January 22, 1996, is applicable to entities of all sizes. This policy is part of EPA's program to waive penalties for entities who may not meet the definition of "small" in EPA's Small Business Policy, but who meet the definition of small under the SBA size standards. The policy encourages regulated entities to discover voluntarily, promptly disclose, correct, and prevent violations of Federal environmental law found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence. If appropriate criteria are met, EPA will not seek gravity-based penalties and will not generally recommend criminal prosecution against the regulated entity.

Eligibility

- 1) Violations, which have or may have occurred, must be identified through an environmental audit or due diligence, e.g., compliance management programs which train and motivate staff to prevent, detect, and correct violations on a daily basis.
- 2) The violation must be identified voluntarily, not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Disclosure of the violation must be made within ten days of discovery, in writing.
- 3) The violation must be discovered and disclosed independent of a government or third-party plaintiff.
- 4) The entity must correct the violation within 60 days or provide written notice where violations may take longer to correct.
- 5) The regulated entity must take steps to prevent a recurrence of the violations.
- 6) The same or closely related violation must not have occurred within the past three years at the same facility or be part of a pattern of violations by the regulated entity over the past five years.
- 7) Violations which may pose imminent and substantial endangerment or resulted in serious harm are not eligible.
- 8) The regulated entity must cooperate with EPA and provide information necessary to determine the applicability of the policy.

Penalty mitigation criteria

1) EPA will waive gravity-based penalties up to 100% for disclosures identified through audits or due diligence that meet the conditions of the policy. EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived where the Agency determines that it is insignificant.

2) EPA will reduce gravity-based penalties by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected if it was not found through an environmental audit or documented due diligence.

3) EPA will not recommend criminal prosecution for an entity who discovers, discloses and corrects violations through audits or due diligence and satisfies all the conditions of the policy.

2.1.3 Policy on Flexible State Enforcement Responses to Small Community Violations

The *Small Communities Policy* was issued in November 1995 and authorizes States to respond to violations with flexibility and compliance assistance and allows communities to put their resources into fixing the worst environmental problems first, rather than paying a penalty. Communities must correct their violations expeditiously, but may prioritize among competing environmental mandates on the basis of comparative risk. States may provide additional incentives to communities and local governments to request compliance assistance by waiving all or part of a penalty for a small community's violations if certain criteria are met. Further, EPA will not generally pursue a separate Federal civil action for penalties or additional injunctive relief.

Eligibility

The policy applies to small communities unable to satisfy all environmental mandates without a State's compliance assistance. These communities must comprise fewer than 2,500 residents and should be: non-profit, government entities that own facilities that supply municipal services. States should use measures of administrative, technical and financial capacity when determining whether communities which meet the conditions of this policy.

Provisions of Policy

1) The State must have in place an adequate process to determine which communities can participate. It must:

- C assess a community's good faith and environmental compliance status.
- C determine a community's administrative, technical, and financial capacity to comply.

2) A community must enter into an enforceable agreement establishing a prioritized schedule based on

risk that requires compliance with all environmental mandates as quickly as is reasonable. If the small community cannot correct all of its violations within 180 days of the State's offer of compliance assistance, the State should begin implementing a written and enforceable compliance agreement and schedule.

3) A State may waive all or part of the penalty if the community is working diligently and in good faith to achieve compliance. This allows communities to devote scarce resources to correcting environmental problems rather than paying a penalty.

4) The policy does not apply to: a) criminal violations; or b) violations that create an imminent and substantial endangerment to public health and the environment (these must be corrected immediately).

2.1.4 State Implementation of Penalty Reduction Program

In most media programs, States may become authorized to have the primary environmental enforcement responsibility in that State. EPA's penalty reduction policies recognize that States are partners in enforcement and compliance assurance and anticipate that two of the policies, the *Small Business Policy* and the *Small Communities Policy*, will be implemented primarily by the States. In implementing the enforcement and compliance assurance program, States are the primary providers of on-site compliance assistance. In particular, EPA will defer to State actions in delegated or approved programs that are generally consistent with the criteria set forth in the *Small Business Policy*. One purpose of the policy, in fact, is to provide guidance for States and local governments to offer the incentives set out in the *Small Business Policy*.

The *Small Communities Policy* was written in consultation with and directly for State implementation, as States are the entities generally enforcing against small communities and local governments. EPA intended for States to use its policies as models and adopt penalty reduction and incentive policies that provide small entities incentives and opportunities to come into compliance with environmental requirements and face relatively low risk of having enforcement penalties assessed against them.

2.2 EPA's Program in the Context of its Compliance Assurance Activities

EPA's program to reduce penalties for small entities should be viewed in context of its enforcement and compliance assurance program. The core program includes the following components: 1) compliance assistance; 2) compliance incentives ; 3) compliance monitoring (e.g., inspections); 4) enforcement actions; and 5) program leadership and evaluation (including data management). States, Tribes and the Federal government implement these core components.

Compliance incentives promote new ways to improve environmental performance, such as encouraging activities by regulated entities to voluntarily discover, disclose, and correct violations before they are identified by the government for enforcement investigation or response. EPA's penalty reduction

program is an example of compliance incentives. The program provides incentives for small entities to receive compliance assistance to ensure that environmental requirements are widely known and understood by the regulated community and that they are being implemented correctly.

Compliance assistance consists of information and technical assistance provided to the regulated community to help it meet the requirements of environmental law. First and foremost, compliance assistance ensures that the regulated community understands its obligations by providing clear and consistent descriptions of regulatory requirements. Compliance assistance can also help regulated industries find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Compliance assistance encompasses a broad spectrum of activities, including outreach materials, providing information on regulatory requirements, conducting on-site visits and answering general inquiries to hot lines or information centers. Two types of compliance assistance are most relevant to EPA's program for reducing penalties for small entities: on-site compliance visits by a federal, State or local government-sponsored program, and guidance and outreach materials on conducting self-audits, self-inspections or systematically undertaking due diligence, e.g., environmental management systems.

2.2.1 On-site Compliance Assistance

On-site assistance includes assistance provided by field personnel, including compliance inspectors. EPA expects that States and local governments will be the primary providers of direct assistance to the regulated community. Still, while EPA believes that direct, on-site individual assistance is primarily a State and local function, there is an appropriate role for EPA Regions to provide some on-site assistance to individual entities in certain circumstances. The Region may fulfill a role similar to the State, but concentrates on different areas or assists a State that lacks capacity in a priority area. For example, EPA may choose to provide compliance assistance in a particular sector or geographic area, or both, or take a multimedia approach to compliance assistance. In some instances, the Region directly implements a program in a non-delegated State or on tribal lands. Where appropriate, the Region's compliance assistance efforts should be linked to EPA's compliance incentives policies. For priority small business sectors, e.g., dry cleaning, small chemical preparation facilities, and auto services repair, many Regions provide on-site compliance assistance to facilities.

2.2.2 Guidance on Conducting Compliance Assessments

EPA, both independently and in conjunction with the States, has developed and continues to develop a number of self-audit/self-inspection guidances that small entities can use to qualify for the penalty reduction provided by EPA's incentive policies. Some of these protocols are geared specifically to small entities and some apply generically to all-sized entities. Here is only a small example of the publications geared in particular to small entities, though available to all-sized entities, to facilitate compliance assessment at their facilities.

Multimedia Inspection Guidance for Dry Cleaners - This document assists field personnel in State, local, and EPA Regional offices to conduct multimedia inspections and compliance assessments of dry cleaners. A multi-media inspection checklist is included in the Guidance for on-site visits. The document is also used by the dry cleaning industry.

Multimedia Compliance/Pollution Prevention Assessment Guidance for Lithographic Printing Facilities - This guidance helps Regions and States determine the compliance status of printing facilities and identify ways to bring them into compliance and go beyond compliance. The document is provided to the printing community for conducting self-assessments/self-audits.

Consolidated Environmental Screening Checklist for Auto Service and Repair Shops w/Support Documentation - This screening checklist lists the major environmental regulatory requirements associated with this industry. A support booklet is available with the checklist to assist users in how to use the checklist and including more information for each requirement, and where to seek further assistance.

Environmental Management Systems: An Implementation Guide for Small and Medium Sized Organizations - Developed under a grant from EPA, this guide facilitates the development of environmental management systems among small and medium sized organizations;

2.3 Promoting the Penalty Reduction Program

In order for EPA's compliance incentives program to motivate the regulated community and encourage small entities to utilize these incentives to come into compliance, small entities and assistance providers working with small entities need to know about and understand the policies. Therefore, actively promoting the program is integral to its success. EPA is beginning to market its penalty reduction program for small entities.

2.3.1 Promoting the Small Business Policy

EPA is undertaking to increase use of the *Small Business Policy* both internally and externally.

Internally, EPA is developing ways to facilitate the use of the *Small Business Policy* by Agency personnel and States. This approach seems to have been successful for the *Audit Policy* and might entail the development of tools to assist the Regions and States understand the policy, model documents to use as templates and streamlined administrative procedures to process disclosures under the *Small Business Policy*.

To increase the use of the *Small Business Policy* outside the Agency, EPA has developed a *Small Business Policy Marketing Plan* which will be used in conjunction with a *Small Business Policy Marketing Strategy*. EPA's marketing strategy includes the following activities:

Activities Undertaken

C Press Release and Distribution of Policy

On June 14, 1995 EPA Assistant Administrator Steve Herman held a trade press event to announce the issuance of the *Small Business Policy*. Press releases on the policy were sent to major newspapers across the country. The Policy was announced in the *Federal Register*. Press releases, facts sheets and copies of the policy were sent to State and local government contacts and State media enforcement organizations as well as small business trade associations. Information was sent to Members of Congress, other government agencies such as the Small Business Administration and the Department of Justice.

C Incorporation in Regional Enforcement and Compliance Assurance Priorities

In formal planning of their annual national enforcement and compliance assurance responsibilities, Regions must make it a priority to identify and test inducements to use the *Policy on Compliance Incentives for Small Businesses*.

C Invitational Form Letters and Fact Sheets to Small Businesses and Stakeholders

The Office of Compliance has sent a form letter and fact sheet to small business industry sectors facing new halogenated solvent air compliance requirements informing them about the upcoming requirements and the availability of the Small Business Policy. Information was also sent to related trade associations and small business assistance providers. Letters were distributed in EPA's *Small Business Ombudsman Update Newsletter*. EPA intends to target other small business industry sectors for letters of this sort.

C Publication in the Small Business Ombudsman Update Newsletter

Upon issuance, and periodically thereafter, EPA has issued a fact sheet and articles on the *Small Business Policy* in the *Small Business Ombudsman Update* newsletter. This newsletter and attachments are sent semi-annually to approximately 500 small business trade associations and 15,000 other persons interested in small business environmental issues, including small businesses, State agency personnel and Congressional contacts.

C Website Availability and Links

The *Small Business Policy* is up on EPA's Office of Enforcement and Compliance Assurance Website with links to the Small Business Ombudsman's Small Business Website, the Office of Air Quality Planning and Standard's Small Business Assistance Program Website and EPA's

Small Business Compliance Assistance Centers.

C Article in *Audit Policy Update*

An article on the *Small Business Policy* will be included in the March 1998 edition of the *Audit Policy Update* which is distributed to trade groups, companies, EPA, State organizations, and other stakeholders.

C Meetings and Conferences

EPA and the States and small business trade associations have discussed implementation of the *Small Business Policy* at a number of meetings and conferences, including but not limited to: Annual State Small Business Ombudsman/Small Business Assistance Program Conferences, Annual Conference of Small Business Development Centers, annual meetings with Regional Small Business Liaisons, 1997 Fall National Pollution Prevention Roundtable Conference, and numerous Regional meetings with trade associations and State enforcement and compliance assistance personnel.

Future Activities

C Marketing Plan for Contacting Appropriate Small Entities and Interested Stakeholders

EPA is planning to identify and directly contact small businesses, and to identify stakeholder organizations or groups with established relationships with the small business community and which can deliver information on the *Small Business Policy* to targeted businesses.

C Brochure

A one page trifold color brochure that provides a general policy overview and list of contacts.

C Small Business/Audit/Small Community Policies Combination Brochure

A brochure that addresses all three policies from a case study perspective.

C Journal Article

A formal presentation of the policy, its background, application and case studies that is appropriate for use in formal journal publications

C Slide Presentation

EPA now has a draft slide presentation for internal and external audiences based in part on using policy case studies.

C Website Links

Internet links for key websites, e.g., OSHA, National Institute of Standards and Technology's Manufacturing Extension Programs, trade associations, etc.

2.3.2 Promoting the Audit Policy

EPA has marketed its Audit Policy very successfully since its promulgation in interim form in April 1995 and in final form in December 1995. This success has not been accomplished simply by waiting for the regulated community to decide to disclose violations, but instead EPA has taken aggressive steps to: (1) educate the general public about the policy; (2) conduct outreach to particular industry sectors; and (3) encourage disclosures from specific companies that can benefit from the policy.

C *Audit Policy Update*

To educate the public generally, EPA publishes an *Audit Policy Update* newsletter that reports on recent efforts to implement the policy and provides names and phone numbers for contacts. This newsletter is available on the Internet and is also distributed in hard copy to EPA and other stakeholders.

C *Audit Policy Interpretive Guidance*

EPA also published the *Audit Policy Interpretive Guidance*, a series of questions and answers concerning some of the most common and significant issues arising when applying the policy. This publication is distributed broadly in hard copy and on the Internet.

C Outreach to Industry Sectors

EPA has encouraged its Regional offices to consider approaches like the "maquiladora" and steel Mini-Mill efforts. Regions identified regulated sectors of concern and affirmatively marketed the *Audit Policy* as a useful tool for those entities to consider. Such marketing has included inviting industry representatives entities to a conference where compliance obligations and the *Audit Policy* are explained, sending letters stating EPA's intention to conduct spot inspections in the near future, and other outreach efforts. EPA has sent information on a major settlement, including a copy of a model settlement, to other companies in the industry in an effort to educate them about their ability to disclose and resolve any potential violations. EPA

regularly speaks about the policy's benefits at conferences to States, trade associations, law firms, public interest groups, and other organizations.

2.3.3 Promoting the Small Communities Policy

EPA's predominant efforts to market the *Small Communities Policy* involve the issuance of grants to States seeking support for efforts to provide multi-media compliance assistance to small communities in a manner consistent with EPA's *Small Communities Policy*. In 1996 EPA awarded a grant of \$35,000 to South Dakota to pilot the policy and develop community action plans. The Office of Compliance recently solicited pre-proposals from States through a *Federal Register* notice and awarded grants to Washington and Missouri, of \$60,000 and \$55,000 respectively, for implementation of the policy.

EPA plans, in addition, to develop a formal marketing strategy, similar to that developed for the *Small Business Policy*, to identify the audiences in need of information on the *Small Communities Policy* and the specific approaches and material to be used in the policy's dissemination.

3.0 Results of Program

3.1 Small Entity Use of EPA's Program as Reported by EPA Regions

3.1.1 Summary

As of the end of fiscal year 1997 small entities had just begun to make use of EPA's penalty reduction program. EPA Regions report that of 149 small entities applying for penalty relief, 95 qualified for the program and were granted relief; 10 were ineligible; and 44 cases are still under review. These figures may understate the number of small entities currently applying for and receiving penalty mitigation. States are responsible for implementing the vast majority of environmental programs. Due to delegation of enforcement programs to States, small entities have been going directly to their State regulators to seek relief (see 3.2, below). EPA expects applications to grow over time as both administrators and potential beneficiaries become more familiar with it. Since this is a new program, EPA Regions are still determining how to effectively implement it in their Regions. Similarly, the regulated community may not yet be adequately familiar with it to recognize its benefits.

To be realistic, however, the Agency must acknowledge that any incentive-based program is subject to counter-incentives that may limit the number of entities stepping forward. For example, since relatively few enforcement actions are taken against small entities (both as a proportion of the total number of small businesses and in comparison to the number of high-profile actions taken against larger companies), small entities may not fear the threat of enforcement to the same degree as larger companies. If they do not fear enforcement, neither are they motivated to take steps to avoid an enforcement-based penalty. Despite EPA's incentive policies, some small businesses may still prefer

not to come forward voluntarily at the risk of regulatory scrutiny. Still, EPA believes that aggressively marketing the program to its Regions, assistance providers, and the regulated community could increase the number of small entities taking advantage of the program.

Small entities have received over \$896,470 in penalty reduction or elimination due to EPA's program. This number, however, does not tell the whole story. In some cases, the small entity has qualified for the policy but the amount of penalty mitigation is still under review. In other cases, it is not possible to calculate the exact dollar amount of penalties reduced under EPA's policies. This holds particularly true for the *Small Communities Policy*. It was not possible to quantify the dollar amount of penalties that have been mitigated through use of this policy. Since States do not expect to recover a penalty from small communities using the *Small Communities Policy*, States rarely, if ever, will go through the labor-intensive effort of calculating penalties for the numerous violations identified in small communities in these cases. Thus, this report can not capture the likely hundreds of thousands of dollars of penalties that communities could have been assessed and had waived.

3.1.2 Data Summary

A chart of the numeric results of Regional implementation of EPA's penalty reduction program through the end of fiscal year 1997 follows:

Use of Penalty Reduction Program by Small Entities through FY97

#of small entities not qualifying for program	# of small entities receiving relief under the program	# of cases still under consideration as to eligibility	dollar amount of penalties reduced
10	95	44	\$896,470

3.2 Small Entity Use of State Penalty Reduction Programs

As discussed above, EPA anticipates that States will play a major role in the implementation of incentive policies. EPA does not formally track State implementation of penalty reduction policies. For purposes of this report, EPA received clearance from OMB for a voluntary information request to the States on their penalty reduction programs. A discussion of State implementation of penalty reduction policies follows.

A total of 33 States responded to EPA's questionnaire concerning incentive policies or programs for small businesses. Of the States that responded, 14 States have policies or programs specifically geared to small entities. These programs vary in nature and scope. Some programs mirror EPA's §507 *Enforcement Response Policy* and are limited to air violations. Some programs are modeled on

EPA's *Small Business Policy*. Other programs may be modeled in part on the *Small Business Policy* but include provisions that are inconsistent with EPA's policy, such as complete penalty immunity or penalty relief without receipt of on-site compliance assistance or an audit. One State said that it was in the process of developing a policy for small entities. Two other States responded that they were considering developing such a policy. Five States responded that they had general policies that provided penalty relief for all size and types of entities.

Not all States that have penalty reduction policies or programs specifically for small entities were able provided numbers indicating use of the policies or total dollar amount of penalties waived. In three States with policies, no small entities requested relief under those policies. State data on entities who qualified under their programs shows that 565 small entities qualified for penalty waiver or reduction under State policies. This figure does not take into account the number of communities that entered into agreements with States under the *Small Communities Policy* (see 3.1.2, *supra*). In the future, EPA may have more information on State incentive programs. EPA has provided a grant in 1998 to the National Conference of State Legislatures to study State incentive activities.

4.0 Conclusion

Small entities have begun to take advantage of EPA's penalty reduction program. EPA is aggressively marketing its penalty reduction program both internally and externally to the regulated community, States, and other assistance providers to increase utilization of the program. EPA's program of policies to mitigate penalties for minor, first-time offenses is an important component of a strong and growing network of support for small entities as they seek to fully understand and comply with environmental regulations.